No. 87-332

Supreme Court, U.S.
FILED
SEP 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

GARLAM ENTERPRISES CORPORATION,
Petitioner,

v.

EXPLOSIVES CORPORATION OF AMERICA,
ROCKCOR, INC., and
GENERAL INSURANCE COMPANY OF AMERICA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STUART G. OLES
Counsel of Record, and
ARTHUR D. McGARRY
DOUGLAS S. OLES
OLES, MORRISON, RINKER,
STANISLAW & ASHBAUGH
3300 Columbia Seafirst Center
701 Fifth Avenue
Seattle, WA 98104
(206) 623-3427

SALVADOR ANTONETTI
FIDDLER, GONZALEZ & RODRIGUEZ
G.P.O. Box 3507
San Juan, Puerto Rico 00936
(819) 753-3113
Attorneys for Respondents

September 25, 1987

JBCD Legal Printers, Seattle, WA

QUESTIONS PRESENTED

1. Does the conflict between several circuit courts of appeal as to the date from which interest should run in the case of reinstatement by the appellate court of a verdict and judgment based thereupon, following its reversal of a district court's grant of judgment n.o.v., justify review by certiorari in this case where there was no jury verdict or judgment n.o.v., but where prolongation of the case after the district court's quantification of damages instead resulted from plaintiff Garlam's own post "judgment" claims against a third party, and when Garlam never sought a Fed. R. Civ. P. 54(b) order of finality?

2. Does allowance of interest on Garlam's judgment in this diversity action, in accordance with 28 U.S.C. § 1961, conflict with either *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) or *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)?

3. Does the district court's exercise of discretion both against awarding attorney's fees under a contract provision allowing for their recovery, and against an award of pre-judgment interest and attorney's fees under Puerto Rico law, involve an impermissible impairment of contract or represent a departure from the accepted and usual course of judicial proceedings?

LIST OF PARTIES

Petitioners identify Explosives Corporation of America ("Explo"), General Insurance Company of America ("GICA"), and Rockcor, Inc. ("Rockcor"), as respondents. Pursuant to Supreme Court Rule 28.1, we advise that Safeco Corporation wholly owns General Insurance Company of America. Olin Corporation wholly owns Rockcor, Inc. Explosives Corporation of America has been dissolved in accordance with Washington law, and its claim against Garlam Enterprises Corporation ("Garlam") in this litigation was assigned to Rockcor.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Opinions Below 1

Statutory Provisions and Court Rules Involved 1

Statement of the Case 4

Related Petition 7

Summary of Argument 7

Argument 9

Conclusion 19

APPENDICES:

Memorandum Opinion And Order (November 16, 1982) 1-27

Motion for Substitution of Party Pursuant to Rule 25(c) of the Federal Rules of Civil Procedure 23-31

Motion to Dismiss for Lack of Appellate Jurisdiction 32-35

TABLE OF AUTHORITIES

Cases *Page*

Affiliated Capital Corp. v. City of Houston, 793 F.2d 706 (5th Cir. 1986) 11,12

Briggs v. Pennsylvania Railroad Co., 334 U.S. 304 (1947). 11,12

Buck v. Burton, 768 F.2d 285 (8th Cir. 1985) 11,12

Cable Marine, Inc. v. M/V Trust Me II, 632 F.2d 1344 (5th Cir. 1980) 17

Caputo v. United States Lines Co., 311 F.2d 413 (2d Cir. 1963), *cert. denied sub nom. Imparato Stevedoring Corp. v. United States Lines Co.*, 374 U.S. 833 (1963) 11,12,13,14

Carrillo v. Sameit Westbulk, 514 F.2d 1214, (1st Cir. 1975) 18

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) i,8,14,15

Felix v. Victory Carriers, Inc., 342 F.Supp. 1386, 1388 (D. P.R. 1972). 18

G.M. Brod & Co. v. U.S. Home Corp., 759 F.2d 1526 (11th Cir. 1985) 16

Gregg v. U.S. Industries, Inc., 715 F.2d 1522, 1542 (11th Cir. 1983), *cert. denied*, 466 U.S. 960 (1984) . . . 17

Heddinger v. Ashford Memorial Community Hospital, 734 F.2d 81 (1st Cir. 1984) 17

Hooks v. Washington Sheraton Corp., 642 F.2d 614 (D.C. Cir. 1980) 12

TABLE OF AUTHORITIES, cont.

Cases	Page
Howell v. Sinclair Refining Co., 20 F.R.D. 623 (N.D. Ala. 1957)	11,13
Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941)	i,14
La Playa Santa Marina, Inc. v. Chris-Craft Corporation, 597 F.2d 1 (1st Cir. 1979)	18
Louisiana & Arkansas Ry. Co. v. Pratt, 142 F.2d 847 (5th Cir. 1944)	11,12
Marston v. American Employers Insurance Company, 439 F.2d 1035 (1st Cir. 1971)	18
New Amsterdam Casualty Co. v. Soileau, 167 F.2d 767, 772 (5th Cir. 1948), *cert. denied*, 335 U.S. 822 (1948)	14
Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).	11,12,13,14
Paul N. Howard Company v. Puerto Rico Aqueduct & Sewer Authority, 110 F.R.D. 78 (D. P.R. 1986)	18
Perry v. Stewart Title Company, 756 F.2d 1197 (5th Cir. 1985), *reh'g granted in part and denied in part*, 761 F.2d 237 (1985)	17
Powers v. New York Central Railroad Co., 251 F.2d 813 (2d Cir. 1958)	11,12

TABLE OF AUTHORITIES, cont.

Cases *Page*

Santiago Martinez v. Compagnie Generale Transatlantique, 517 F.2d 371 (1st Cir. 1975), *cert. denied sub nom. Fred Imbert, Inc. v. Compagnie Generale Transatlantique*, 423 U.S. 1048 (1976) 18

Turner v. Japan Lines, Ltd., 702 F.2d 752 (9th Cir. 1983) 11,12

United States ex rel. DeBlasio Constr., Inc., v. Mountain States Construction Co., 588 F.2d 259 (9th Cir. 1978) 17

Weitz Company, Inc. v. Mo-Kan Carpet, Inc., 723 F.2d 1382 (8th Cir. 1983) 14,15

Statutes and Court Rules

28 U.S.C. § 1961 7,8,9,14,15

28 U.S.C. § 811 14

Fed. R. Civ. P. 54(b) i,8,9,10,11,12,13,14

Fed. R. Civ. P. 25(c) 5,10

Fed. R. Civ. P. 58 5,8,9,11,13

Fed. R. Civ. P. 79(a) 9

Fed. R. Civ. P. 54(a) 9

P.R. R. Civ. P. 44.1(d) 17

P.R. R. Civ. P. 44.3 16,17

IN THE

Supreme Court of the United States

October Term, 1987

GARLAM ENTERPRISES CORPORATION,
Petitioner,

v.

EXPLOSIVES CORPORATION OF AMERICA,
ROCKCOR, INC., and
GENERAL INSURANCE COMPANY OF AMERICA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Garlam's listing of the opinions below is incomplete without reference to the Memorandum Opinion and Order of the district court dated November 16, 1982, a copy of which is reproduced in respondents' appendix (R.A.) hereto. R.A. 1-27.

STATUTORY PROVISIONS AND COURT RULES INVOLVED

The following supplements the list of statutes and rules commencing at 167a of the petition.

28 U.S.C. § 1961 (this is the text of the statute *prior* to the 1982 amendment [prior to 1948, the predecessor statute of 28 U.S.C. § 1961 was codified at 28 U.S.C. § 811]):

Interest

Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of entry of the judgment, at the rate allowed by State law.

(June 25, 1948, c. 646, 62 Stat. 957.)

Rule 25(c), Fed. R. Civ. P.:

Rule 25. Substition of Parties

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

Rule 54(a), Fed. R. Civ. P.:

Rule 54. Judgments, Costs

(a) *Definition; Form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Rule 58, Fed. R. Civ. P.:

Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court

that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Rule 79(a), Fed. R. Civ. P.:

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) **Civil Docket.** The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order of judgment of the court and of the returns showing execution of process. The

entry of an order of judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

Puerto Rico Rule of Civil Procedure 44.1(d):

> Attorney's fees. Where a party has been obstinate, the court shall in its judgment impose on such person the payment of a sum for attorney's fees.

Puerto Rico Rule of Civil Procedure 44.3:

> **44.3 Legal Interest**
>
> (a) Every judgment ordering the payment of money shall include legal interest to be computed on the amount of the judgment from the date it was entered up to the time of satisfaction thereof, without including costs and attorney's fees.
>
> (b) Except when the defendant is the Commonwealth of Puerto Rico, its municipalities, agencies, instrumentalities or officers acting in their official capacity, the court may impose on an obstinate party the payment of legal interest to be computed on the amount of the judgment from the time the cause of action accrues in actions of debt, and in actions for damages, from the time the complaint is filed until judgment is entered. The provisions of this paragraph shall be applicable to the causes of action filed after May 26, 1967.

STATEMENT OF THE CASE

With respect to the central issue of Garlam's petition as to when interest should commence accruing on its judgment amount, respondents adopt and incorporate by reference the procedural history summary found in the First Circuit's April 30, 1987 Opinion at 34a-38a ("a" references petitioner's appendix). Respondents here only highlight some critical procedural matters and incomplete statements by Garlam.

Garlam emphasizes that on November 16, 1982, the district court executed and filed a separate document denominated "Judgment"[1] (165a) purportedly in compliance with Fed. R. Civ. P. 58. That judgment was in favor of Garlam and against Explo in the amount of $2,423,177.00, and against GICA for $1,230,000. Garlam neglects, however, to report that also on November 16, 1982, the district court executed and filed a "Memorandum Opinion and Order" (which is missing from Garlam's appendix, but attached hereto at R.A. 1-27).

That Memorandum Opinion and Order addressed Garlam's motion to reconsider the district court's prior dismissal of Garlam's amended complaint joining Rockcor as an additional party defendant. R.A. 3-10, 24. The district court denied reconsideration and instead authorized Garlam to file a motion pursuant to Fed. R. Civ. P. 25(c) for substitution of Rockcor as judgment debtor. R.A. 10, 26. In so doing, the district court forewarned Garlam its pursuit of a new claim against Rockcor would prolong the litigation:

> We are painfully aware that the end result of this ruling may well be an additional dilation of this ten year old case, yet to leave the matter as it stands is a blow to fairness and by doing so we would be inviting more delay and appeals.

(Footnote omitted; R.A. 26.)

---

[1] Garlam's Table of Contents at p. V of its petition incorrectly states the judgment date as November 16, 1986. It also there incorrectly states the date of the district court's November 16, 1982 "Opinion and Order" as November 16, 1986.

In order to eliminate any confusion, we note that on November 16, 1982, the district court executed three documents: (1) a "Judgment" (found at 165a-166a); (2) an "Opinion and Order" (found at 116a-164a) explaining the basis of its adoption of the Special Master's findings as to the amount of damages; and (3) a "Memorandum Opinion and Order" (found in respondents' appendix at R.A. 1-27) concerning the substitution issue.

Garlam nevertheless filed its substitution motion on December 15, 1982. R.A. 28-31. Meanwhile, Explo appealed the district court's November 16, 1982 "Judgment." A ground upon which Garlam in April 1983 successfully argued for dismissal thereof to the First Circuit is most relevant to its present petition. Garlam stated that:

> The judgment entered by the court below is not a final decision *since the judgment appealed does not contain the certification required under Rule 54(b), F. R. Civ. P., in that there are claims which affect the rights of the parties pending resolution by the court below.*
>
> Therefore, this court lacks appellate jurisdiction since a final order has not been entered. *See Coulter v. Sears Roebuck & Company*, (5th Cir-1969) 411 F.2 1189; *A.O. Smith Corporation-vs-Simms Consolidated Ltd.* (10th Cir-1981) 647 F.2 118.

(Emphasis added, footnote omitted; R.A. 33-34.)

With respect to the issues raised in Garlam's petition concerning the lack of any award to it of attorneys' fees or prejudgment interest, the district court's November 16, 1982 Opinion and Order (116a-164a) made several relevant findings (particularly at 153a-156a). The district court noted that the Special Master had reduced Garlam's claimed damages by "almost three million dollars" (153a) and that "the master's task could have perhaps been made easier if Garlam had conducted the cross-section field measurements" (155a) as required under the parties' subcontract. The court also referred to Garlam's "customary diffuse manner of argumentation" (160a) and noted Garlam's "repeated efforts to cloak its relationship with PRHA and its pending claims" (127a) in related litigation in the Puerto Rico Superior Court.

Most significantly, the district court expressly found (at 156a):

> For these same reasons,[15] we conclude that Explo has not conducted the litigation in an obstinate manner and that imposition of prejudgment interest, cost and attorney's fees is not justified.

Note 15: The Master's findings prove that Explo's claim was not frivolous unless one can consider the defense of almost three million dollars of liability as obstinate litigation. The damages were certainly not uncontested and there was no indication of any misuse of legal procedures to delay the case. *See Ferrer Delgado v. Sylvia de Jesus*, 440 F. Supp. 979, 982 (DPR 1976).

As developed *infra*, these findings are fatal to Garlam's claim under Puerto Rico law.

RELATED PETITION

Respondents argue below that Garlam's petition for certiorari should be denied. Nevertheless, respondents believe that certiorari is appropriate with respect to issues raised in their previously filed petition in Supreme Court No. 87-204.

SUMMARY OF ARGUMENT

1. The Conflict Between Circuits Concerning Application of 28 U.S.C. § 1961 in the Context of Reversal of n.o.v. Judgments, Is Inapposite to This Case Which Instead Involved an Unresolved Third Party Claim.

Garlam argues that there is a conflict between several circuit courts of appeal as to the date from which interest should accrue under 28 U.S.C. § 1961, when post-judgment motions are made. This conflict is narrower than suggested by Garlam, and — most importantly — is inapposite to the facts of this case.

Specifically, several circuit courts differ as to when interest should begin accruing, after an appellate court has reinstated a jury verdict and judgment based thereupon following its reversal of a district court grant of a judgment n.o.v. Some courts think interest should run from the date of the original verdict, others from the date of the appellate court mandate, and one favors a case by case approach.

In this case, however, there was no jury, nor any judgment n.o.v. Instead, following the initial trial court entry of "judgment" against Explo, Garlam itself injected into the litigation a claim against Rockcor seeking to substitute it as judgment debtor. Moreover, it did so without making any request to the trial court for a Fed. R. Civ. P. 54(b) certification of finality. Under these circumstances, as even cases relied upon by Garlam recognize, judgment was not properly entered under Fed. R. Civ. P. 58, nor would interest begin accruing, until resolution of the third party claim against Rockcor.

2. **28 U.S.C. § 1961, Which Provides for Post-Judgment Interest in All Federal (Including Diversity) Cases at a Rate Tied to the Price of Treasury Bills, Has Been Held to be Constitutional Under the Doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), Because the Matter of Post-Judgment Interest is Rationally Capable of Classification as Procedural.**

3. **In Enforcing a Contract Providing for an Award of Attorneys' Fees, and in Assessing Prejudgment Interest or Attorneys' Fees Under Puerto Rico Law, the Court May Deny an Award in Its Sound Discretion.**

ARGUMENT

I. Review by Certiorari Is Not Justified With Respect to the First Circuit Court of Appeals' Application of 28 U.S.C. § 1961, Because No Final Judgment Was Entered Until March 6, 1986, As a Result of Garlam's Own Raising of Claims Against an Additional Party, and the Conflict Between the Circuit Courts of Appeal Relied Upon By Garlam Is Inapposite to the Facts of This Case.

A. There Was No Final Judgment Until March 6, 1986, Because the "Judgment" Entered on November 16, 1982, Left Unadjudicated Garlam's Claim Against Rockcor, Inc., and There Was No Certification of Finality Under Fed. R. Civ. P. 54(b).

Garlam's first question presented at page I of its petition, as well as its supporting argument, assert and assume that the district court's "judgment" of November 16, 1982 (165a-166a) was entered "pursuant to rules 58 and 79(a), Fed. R. Civ. P." Garlam's argument fails precisely because the November 16, 1982 judgment was demonstrably not effectively entered pursuant to Fed. R. Civ. P. 58. The First Circuit Court of Appeals' Opinion pertinently states (at 38a-39a):

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the *date of the entry of the judgment.*" 28 U.S.C. § 1961 (Supp. 1987) (emphasis added [by the First Circuit]).
>
> A judgment "includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). It is clear from this court's prior dimissals that the November 1982 judgment was not final because other issues remained to be resolved.
>
> The district court never made a Rule 54(b) determination as to the November 1982, judgment nor did Garlam

> ask for one. Moreover, the district court's order of August 8, 1985 — allowing the proceedings to continue in that court despite a pending notice of appeal — suggests that the judgment of November 16, 1982, was not intended to be final.

As developed above in the Statement of the Case, the district court contemporaneously with its November 16, 1982 "Judgment" entered a "Memorandum Opinion and Order" (R.A. 1-27) authorizing Garlam to file a Fed. R. Civ. P. 25(c) motion to substitute Rockcor as judgment debtor for Explo, commenting that "the end result of this ruling may well be an additional dilation of this ten year old case, . . ." R.A. 26.

As Garlam itself pointed out to the First Circuit Court of Appeals in April of 1983, in successfully arguing for a dismissal of Explo's appeal from the November 16, 1982 judgment:

> the judgment entered by the court below is not a "final decision" since the judgment appealed does not contain the certification required under Rule 54(b), F.R.Civ.P., *in that there are claims which affect the rights of the parties pending resolution by the court below.*

(Emphasis added, R. A. 33.)

Garlam was exactly right. Then, and now, Fed. R. Civ. P. 54(b) pertinently provides:

> In the absence of such determination and direction, an order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Because Fed. R. Civ. P. 58 is expressly "subject to the provisions of Rule 54(b)", and because there was no Rule 54(b) order of finality, there was no judgment effectively entered "pursuant to Rule 58", notwithstanding Garlam's repeated assertions.[2] Moreover, as will be developed *infra*, several cases relied on by Garlam support this same analysis, and none are inconsistent with the result appealed from by Garlam.

B. The Conflict Between the Circuit Courts of Appeal Relied Upon by Garlam Involves When Interest Should Commence Accruing When There Has Been a Reinstatement of a Jury Verdict and Judgment Based Thereupon, After Reversal of a Trial Court n.o.v. Judgment, But Such Conflict Is Inapposite to this Case Where There Was No Jury, or Judgment n.o.v., and Where Instead a Prolongation of the Litigation Resulted From Garlam's Additional Claim Therein Against Rockcor.

Garlam's argument at pages 10-17 of its petition that a conflict among circuit courts of appeal justifies certiorari, cites nine cases which evidence the conflict. Six of those cases[3] arise

---

[2] "Until and unless the court does so [makes a Rule 54(b) certification], as the courts in *Caputo* [*v. United States Lines Co.*, 311 F.2d 413 (2d Cir. 1963), *cert. denied sub nom. Imparato Stevedoring Corp. v. United States Lines Co.*, 374 U.S. 833 (1963)] and *Howell* [*v. Sinclair Refining Co.*, 20 F.R.D. 623 (N.D. Ala. 1957)] emphasized, the clerk has no authority to enter judgment, for Rule 58 is expressly made subject to the provisions of Rule 54(b)." *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 846 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

[3] *Powers v. New York Central Railroad Co.*, 251 F.2d 813 (2d Cir. 1958); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983); *Buck v. Burton*, 768 F.2d 285 (8th Cir. 1985); *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706 (5th Cir. 1986); *Louisiana & Arkansas Ry. Co. v. Pratt*, 142 F.2d 847 (5th Cir. 1944); *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304 (1947).

judgment notwithstanding the verdict, and the subsequent reinstatement of the jury verdict and judgment thereupon by the appellate court. Some of those cases hold that interest should run from the date of the original jury verdicts;[4] others hold that interest should run from the date of appellate court mandate;[5] one holds that a case by case analysis is appropriate;[6] and one found it unnecessary to address the issue.[7]

While it may one day be appropriate for this Court to address and resolve that conflict, we respectfully submit that it should wait for a case which facts turn upon and illustrate that conflict, which the present case plainly does not. The distinguishing element of the present case is highlighted by the other three cases discussed by Garlam, *Caputo v. United States Lines, Co.*, 311 F.2d 413 (2d Cir. 1963), *cert. denied sub nom. Imparato Stevedoring Co. v. United States Lines Co.*, 374 U.S. 833 (1963), *Hooks v. Washington Sheraton Corp.*, 642 F.2d 614 (D.C. Cir. 1980), and *Ohio-Sealy Mattress Mfg. Co., v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). As now developed, those cases teach that the pendency of unresolved third party claims, such as are involved here, combined with the absence of a Fed. R. Civ. P. 54(b) certification, precludes accrual of interest prior to entry of a final judgment.

In *Caputo*, a clerk's form of judgment was entered on November 6, 1961 based upon the jury's verdict. However, at that time there had been no determination of a third party claim by the court. It was not until March 20, 1962 that final judgment was entered. The Second Circuit held that the pendency of unresolved third party claims precluded accrual of interest from the earlier judgment, because of the absence

[4] *Turner, supra; Buck, supra; Louisiana & Arkansas Ry. Co., supra.*

[5] *Powers, supra.*

[6] *Affiliated, supra.*

[7] *Briggs, supra*, 344 U.S. at 307.

of a Rule 54(b) certification. 311 F.2d at 416-417. Similarly, in *Hooks*, *supra*, the District of Columbia Circuit held that a May 27, 1975 clerk-entered judgment upon a jury verdict could not accrue interest when no finality order was entered under Rule 54(b) and a claim by the judgment debtor over against a third party remained unadjudicated. 642 F.2d at 617.

Finally, *Ohio-Sealy*, *supra*, involved the question as to whether interest should accrue on a judgment for damages based upon a jury verdict in favor of a licensee against its licensor, when there remained pending for adjudication the licensee's request for equitable relief against the licensor. The Seventh Circuit concluded that interest should accrue from the earlier date of jury verdict and judgment, prior to resolution of the equitable claim, because there were no separate claims within the meaning of Rule 54(b), "but merely one claim for two types of relief." 585 F.2d at 846.

Significantly, however, the court did approve the result in *Caputo*, *supra*, which had denied interest until resolution of a third party claim, in the absence of a Rule 54(b) certification of finality. The *Ohio-Sealy* court recognized that when there are separate claims (or, as must also be noted, claims against third parties, as in this case) which are unresolved, then no judgment which will bear interest can be entered barring a Rule 54(b) order. The Seventh Circuit stated at 585 F.2d 846:

> Until and unless the court does so [makes a Rule 54(b) certification] as the courts in *Caputo* and *Howell* [v. Sinclair Refining Co., 20 F.R.D. 623 (N.D. Ala. 1957)] emphasized, the clerk has no authority to enter judgment, for Rule 58 is expressly made subject to the provisions of Rule 54(b).

In summary, the conflict discussed by Garlam is inapposite to this case. Garlam's discussion distorts the true

judgment motions for relief" category, without addressing the vital distinction between judgment n.o.v. cases, and those involving unresolved claims against third parties. While there is a conflict between the judgment n.o.v. cases, those involving unresolved third party claims unanimously deny interest in the absence of a Rule 54(b) finality order. Moreover, as the Seventh Circuit's discussion in *Ohio-Sealy*, *supra*, makes clear, even those cases allowing interest in the n.o.v. cases from the date of the original verdict, do not support the result here urged by Garlam. Indeed, the *Ohio-Sealy* court expressly approved the result in *Caputo*, *supra*, relied upon by the First Circuit in denying interest until the resolution of the third party claim against Rockcor.

II. The Circuit Court of Appeals Properly Awarded Interest in Accordance with 28 U.S.C. § 1961, and Neither *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), Nor *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), Require a Contrary Result.

Garlam's petition asserts at page 18 that the Court of Appeals opinion directly conflicts with *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). It argues that *Klaxon*,[8] *supra*, and *New Amsterdam Casualty Co. v. Soileau*, 167 F.2d

[8] *Klaxon* held that in a diversity case, a district court was bound under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to apply the conflict of law rules of the state in which it sat. Consequently, the Delaware district court's "independent determination" (313 U.S. 496) as to what law governed the matter of prejudgment interest, was reversed and remanded for a decision based on Delaware law. The court noted that this accorded with the provision in 28 U.S.C. § 811, the predecessor statute to 28 U.S.C. § 1961, that the post-judgment interest rate was per the statute determined according to state law. 313 U.S. 497. As noted in *Weitz Company, Inc. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382, 1385-86 (8th Cir. 1983), 28 U.S.C. § 1961 was amended in 1982 to tie the post-judgment interest rate to the price of Treasury bills.

767, 772 (5th Cir. 1948), *cert. denied*, 335 U.S. 822 (1948), demonstrate that in diversity actions, interest is computed according to state law. Garlam then argues that Puerto Rico law allows for interest from the date of breach of contract (Garlam cites no Puerto Rico authority) and that such rule must be applied in this case under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Respondents concede that state law governs the availability of prejudgment interest in diversity actions, and that Puerto Rico law allows therefor in certain exceptional cases. However, as developed under III below, the district court properly exercised discretion against an award. With respect to post-judgment interest, the sufficient answer is provided by *Weitz Company, Inc. v. Mo-Kan Carpet Inc.*, 723 F.2d 1382 (8th Cir. 1983), which specifically rejects Garlam's argument that state law governs under the *Erie* doctrine. Pertinent discussion upholding the application of 28 U.S.C. § 1961 in diversity cases is found at 723 F.2d 1385-1386:

> The final issue concerns the cross-appeal of Weitz. Weitz argues that, in this diversity suit, the district court erred in applying the federal interest statute rather than the Iowa interest statute. *We hold that federal law governs the award of post-judgment interest in this case while state law governs the award of prejudgment interest. The federal judgment interest statute was amended and became effective October 1, 1982.* Federal Courts Improvement Act of 1982, Pub.L. 97-164, § 302(a), 96 Stat. 25, 55-56 (codified at 28 U.S.C.A. § 1961(a) (Supp. 1983)). *Federal law now provides for interest from the date of judgment at a floating rate determined by the coupon yield of United State Treasury bills.* The provision covers "any judgment in a civil case recovered in a district court." *Id.* No exemption is made for actions based on diversity of citizenship. This court must apply an applicable federal provision over a conflicting state provision, unless the federal provision is found unconstitutional. *See Hanna*

> v. Plumer, 380 U.S. 460, 471, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965); U.S. Const. art. VI, Cl. 2. We believe that the new federal interest statute is constitutional and therefore governs the award of postjudgment interest in this case. *Accord Rose Hall, Ltd. v. Chase Manahattan Overseas Banking Corp.*, 566 F.Supp. 1558, 1574 n. 46 (D.Del. 1983); *Lake Tahoe Sailboat Sales & Charter, Inc. v. Douglas County*, 562 F.Supp. 523, 524 (D.Nev. 1983); *Interstate Fire & Casualty Co. v. Hartford Fire Insurance Co.*, 548 F.Supp. 1185, 1189 (E.D.Mich. 1982). We affirm this portion of the district court's order.
>
> . . .
>
> The *Erie* doctrine does not require a different result. Even if the rate of interest that a judgment will bear is in some sense "substantive," in that it is a part of the damages recovered by the winning side, it is also easily susceptible of characterization as "procedural," since it has to do exclusively with events that occur after a dispute gets to court. The question of interest, therefore, is at most in "the uncertain area between substance and procedure," and "rationally capable of classification as either." *Hanna v. Plumer, supra*, 380 U.S. at 472, 85 S.Ct. at 1144. It is therefore a subject with respect to which Congress has full power to legislate, even as to cases that get into the federal courts only because of diversity of citizenship.

Accord, G.M. Brod & Co. v. U.S. Home Corp., 759 F.2d 1526, 1542 (11th Cir. 1985). We are aware of no conflicting authority.

As indicated in *Weitz, supra*, state law governs the award of prejudgment interest in diversity actions. Puerto Rico Civil Rule 44.3 does allow award of prejudgment interest (from the date of filing the complaint) against parties whose conduct of litigation is found to have been "obstinate." In our case, the district court expressly declined to authorize an award against Explo under Rule 44:

> The new light cast by the Master's findings on the real damages suffered convinces us that Explo was not obstinate in its defense of the case.

(154a.) As now developed, ample authority establishes the trial court's discretion to deny prejudgment interest or attorney's fees to Garlam.

III. The Trial Court's Exercise of Sound Discretion Against an Award of Attorney's Fees and Prejudgment Interest Does Not Unconstitutionally Impair a Contractual Obligation, or Depart From the Accepted and Usual Course of Judicial Proceedings.

Even when a written agreement provides for an award of attorney's fees in disputes between the parties, the trial court has discretion to decline such an award if it would be inequitable or unreasonable (as determined in this case). *See, e.g., Perry v. Stewart Title Company*, 756 F.2d 1197, 1211 (5th Cir. 1985), *reh'g granted in part and denied in part*, 761 F.2d 237 (1985); *Gregg v. U.S. Industries, Inc.*, 715 F.2d 1522, 1542 (11th Cir. 1983), *cert. denied*, 466 U.S. 960, 104 S.Ct. 2173, 80 L.Ed.2d 556 (1984); *Cable Marine, Inc. v. M/V Trust Me II*, 632 F.2d 1344, 1345 (5th Cir. 1980); *United States ex rel. DeBlasio Constr., Inc., v. Mountain States Construction Co.*, 588 F.2d 259, 263 (9th Cir. 1978).

The district court also had discretion to deny Garlam's requests for attorney's fees and prejudgment interest under Puerto Rico Civil Rule 44.1(d) or 44.3 (permitting such awards against parties whose conduct of litigation is found to be "obstinate"):

> The Puerto Rico Rule provides that such awards are left to the court's discretion, and that in the case of attorneys' fees and prejudgment interest, the judge must find that the party against whom such award is requested has been obstinate.

Heddinger v. Ashford Memorial Community Hospital, 734 F.2d 81, 86 (1st Cir. 1984). It has clearly been held that "[a]

determination of obstinacy must necessarily rest heavily on the discretion of the trial court."[9]

Based on the facts and procedural history of this case (as summarized earlier in this brief), the district court had ample justification for an exercise of discretion against award of attorney's fees and prejudgment interest. Obviously such an exercise is not an unconstitutional impairment of contractual obligation or a departure from the accepted course of judicial proceedings.

---

[9] *Marston v. American Employers Insurance Company*, 439 F.2d 1035, 1042 (1st Cir. 1971); *see also, Paul N. Howard Company v. P.R. Aqueduct & Sewer Authority*, 110 F.R.D. 78, 83 (D. P.R. 1986) ("The matter of whether or not to award attorney fees for obstinacy is discretional"); *Felix v. Victory Carriers, Inc.*, 342 F.Supp. 1386, 1388 (D. Puerto Rico 1972). *See also Santiago Martinez v. Compagnie Generale Transatlantique*, 517 F.2d 371, 375 (1st Cir. 1975), *cert. denied sub nom. Fred Imbert, Inc. v. Compagnie Generale Transatlantique*, 423 U.S. 1048 (1976). The First Circuit has expressed concern about the "dangers" of over-applying Rule 44. *See, e.g., Carrillo v. Sameit Westbulk*, 514 F.2d 1214, 1219 (1st Cir. 1975), *cert. denied sub nom. Westbulk v. Caribe Shipping Co.*, 423 U.S. 1014 (1975) (vacating and remanding for the district court to provide "more explicit" findings to support an award of counsel fees). Where a case "presented close questions and sharp conflicts in the evidence on both liability and damages," the First Circuit reversed an award of attorneys' fees despite a trial court finding of "obvious temerity." *La Playa Santa Marina, Inc. v. Chris-Craft Corporation*, 597 F.2d 1, 7 (1st Cir. 1979).

CONCLUSION

Garlam's petition for certiorari should be denied. Respondents submit, however, that certiorari should be granted with respect to the issues raised in their petition for certiorari filed in Supreme Court number 87-204.

DATED this 25th day of September, 1987.

Respectfully submitted,

STUART G. OLES
Counsel of Record, and
ARTHUR D. McGARRY
DOUGLAS S. OLES
OLES, MORRISON, RINKER,
STANISLAW & ASHBAUGH

SALVADOR ANTONETTI
FIDDLER, GONZALEZ & RODRIGUEZ

Counsel for Respondents

---

[9] *Marston v. American Employers Insurance Company*, 439 F.2d 1035, 1042 (1st Cir. 1971); *see also, Paul N. Howard Company v. Puerto Rico Aqueduct & Sewer Authority*, 110 F.R.D. 78, 83 (D. Puerto Rico 1986) ("The matter of whether or not to award attorney fees for obstinacy is discretional"); *Felix v. Victory Carriers, Inc.*, 342 F.Supp. 1386, 1388 (D. P.R. 1972). *See also Santiago Martinez v. Compangnie Generale Transatlantique*, 517 F.2d 371, 375 (1st Cir. 1975), *cert. denied sub nom. Fred Imbert, Inc. v. Compagnie Generale Transatlantique*, 423 U.S. 1048 (1976). The First Circuit has expressed concern about the "dangers" of overapplying Rule 44. *See, e.g., Carillo v. Sameit Westbulk*, 514 F.2d 1214, 1219 (1st Cir. 1975), *cert. denied sub nom. Westbulk v. Caribe Shipping Co.*, 423 U.S. 1014 (1975) (vacating and remanding for the district court to provide "more explicit" findings to support an award of counsel fees). Where a case "presented close questions and sharp conflicts in the evidence on both liability and damages," the First Circuit reversed an award of attorneys' fees despite a trial court finding of "obvious temerity." *La Playa Santa Marina, Inc. v. Chris-Craft Corporation*, 597 F.2d 1, 7 (1st Cir. 1979).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EXPLOSIVES CORPORATION OF AMERICA,	)	
Plaintiff	)	
vs	)	CIVIL 72-0001CC
GARLAM ENTERPRISES CORPORATION & FEDERAL INSURANCE COMPANY	)	
Defendants	)	

MEMORANDUM OPINION AND ORDER

On September 9, 1977 Garlam Enterprises Corporation, defendant and counterclaimant, filed a motion requesting substitution of parties under Rule 25(c), Fed. R. Civ. P. on the grounds that Explo had been dissolved in 1975 by merger with Excoa, Inc. which, in turn, was "liquidated or dissolved" into Rocket Research Corporation, now called Rockor, Inc. (Rocket). Movant stated that Excoa and Explo were both wholly-owned by Rocket and that the latter was

now paying the attorneys' fees for Explo in this case. Plaintiff opposed this contending that to bring Rocket at such a late stage of the proceeding and to hold it liable before having had its day in court would violate the due process clause of the Constitution. It also argued that Rocket had not been served in accordance with the requirements of Rule 25[1/] and cited Ransom v Brennan, 437 F.2d

---

1/ Rule 25 Fed. R. Civ. P. in its pertinent part states:

(a) Death

(1) . . . The motion for substitution . . . together with the notice of hearing shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons and may be served in any judicial district. . . .

(2) . . . .

(b) . . . .

(See next page.)

513 (5th Cir. 1971) cert. denied 403 US 904, in support of the proposition that a Rule 5, Fed. R. Civ. P. service was not sufficient to invest the Court with personal jurisdiction over a substituted party. The request for substitution of parties was subsequently withdrawn and a petition to amend the counterclaim[2/] to join Rocket as a party liable to Garlam was granted. Rocket then filed a Motion to Dismiss for lack of personal jurisdiction alleging that since it had no contacts with this forum prior to

---

(Continued from previous page.)

(c) Transfer of interest. . . . Service of the motion shall be made as provided in subdivision (a) of this Rule. . . .

2/ Although referred to as a third-party complaint, the pleadings reveal that Garlam's amended complaint is in reality an amended counterclaim joining Rocket as counterdefendant with Explo, Excoa and General Insurance Company of America; see: R. 13(h) Fed. R. Civ. P.

acquiring Explo's interest in this action, the order permitting its joinder as a party liable to Garlam constitutes a violation of the due process principles outlined in International Shoe Co. v Washington, 326 US 310 (1945), particularly since Explo, its predecessor, had already been found liable to Garlam. See: Partial Judgment issued on April 4, 1976. It urges that this would be tantamount to a determination on the merits that it was the alter ego or corporate shell of Explo and, thus, responsible for the latter's liabilities. Finally, it is suggested that Rocket was not properly served and that, assuming arguendo that Garlam's allegations are true, dismissal of the amended counterclaim is warranted under the doctrine of forum non conveniens. The affidavit of Dr. George S. Sutherland, movant's

Chairman of the Board and Chief Executive Officer, filed in support of dismissal states that in 1973 Explo was merged into Excoa which was dissolved in 1976 and that it conveyed its assets to Rocket[3/] in partial satisfaction of its debts.

3/ In 1973, Excoa, Inc. was formed as a Washington Corporation for the purpose of developing and manufacturing explosives and all forms of chemicals. Shortly thereafter, Explo was merged into Excoa, Inc. The merger was undertaken by a short form merger procedure through which the sole shareholder of Excoa, Inc., bought out the interests of Explo shareholders. Since there was no public market for the stock, the offering price was based upon a valuation made by an independent consultant. From 1973 to until the time of its dissolution, Excoa, Inc. was maintained distinct from Rocket, with the business of the two companies continuing to be separate; Rocket continued in the rocket engine and propellant business and Excoa attempted to remain in the explosives business. At the time of Excoa's dissolution in 1976, Excoa owed Rocket several millions of dollars as a result of its losing operations. As partial satisfaction of those debts, Excoa conveyed its assets in partial satisfac-

(See next page.)

Rocket's Motion to Dismiss was initially denied but, upon reconsideration, it was decided that there was no personal jurisdiction over it and the action against it was dismissed. In its revised ruling the court emphasized that most of the alleged contacts with the forum were not supported by the record and that others were irrelevant--for example, that Rocket was paying the attorney's fees for Explo's defense in this action--since they occurred in 1976 after Rocket had acquired the cause of action and not when the suit was instituted. Dragor Shipping Corp. v Union Tank Car Co., 361 F.2d 43 (7th Cir. 1966) cert. denied Union Tank

---

(Continued from previous page.)

tion of such obligations. However, due to the financial condition of Excoa, no distribution of assets could be made to Rocket as a shareholder of Excoa. (Affidavit of George Sutherland pp. 3 and 4.)

Car Co. v Dragor Shipping Corp., 385 US 831, was cited in support of the proposition that personal jurisdiction over a party must exist at the time the complaint is filed and cannot be acquired by later contacts with the forum. Thereafter, Garlam filed a motion for reconsideration which was opposed by Rocket. However, the court by footnote order of December 28, 1979, determined that the motion for reconsideration was moot since Garlam had already appealed the dismissal order.4/ On May 27, 1981 Garlam requested that the motion for reconsideration be reinstated. The matter concerning the request to reconsider was referred to Chief Judge Pesquera who

---

4/ The appeal was dismissed for lack of appellate jurisdiction on December 10, 1979. Garlam contends that this footnote order was never notified and there is no indication in the record that it was.

subsequently disqualified himself. The parties then filed other motions requesting reinstatement of the motion, on the one hand, and dismissal as moot and untimely, on the other.

If we consider the procedural framework against which the court was determining the issue of personal jurisdiction, the findings and legal standards contained in its order are correct. By focusing the matter as a request to amend the counterclaim to add a new party responsible to Garlam on the merits of a prior determination of contractual liability in its favor, the conclusion that there was no personal jurisdiction over Rocket was correct. If one considers the possible retroactive effect of the amended counterclaim, the lack of any indication as to Rocket's involvement with this forum prior to the transfer of

assets, and the fact that liability had already been determined, the court, if it was to reconcile its ruling with the due process considerations of International Shoe and its progeny (see: World-Wide Volkswagen Corp. v Woodson, 444 US 286 (1980), had no alternative but to dismiss. As Rocket correctly contends, to have ruled otherwise would have entailed a determination without any type of hearing that Rocket was Explo's alter ego all throughout. Viewed within the procedural backdrop of Garlam's request, the determination that there was no personal jurisdiction over Rocket so as to join it as a party according to the criteria of Rules 13(h), 15, 17 and 19, Federal Rules of Civil Procedure, that is, directly liable to Garlam on the action for breach of contract for the reasons already determined by Judge Bootle, the order of

October 29, 1979 is entirely correct and reconsideration is unwarranted. If the issues, however, had been defined within the context of a Rule 25(c) substitution[5/] the ensuing consequences as well as the court's determination, would have been different.

In considering the propriety of a Rule 25(c) substitution it is of paramount importance to recognize that the substitution or joinder does not affect the substantive rights of the transfer[or] or of the transferee.

5/ Garlam contends that it abandoned its request for substitution at the request of Judge Pesquera. There is nothing in the record to sustain this. We must assume that these decisions are voluntarily made and that counsel understand the consequences of the procedural strategy they wish to follow.

Television Reception Corporation v Dunbar, 426 F.2d 174, 178 (6th Cir. 1970): Federal Deposit Ins. Corp. v Tisch, 89 FRD 446, 448 (EDNY 1981). This consideration is essential in order to understand that the possible substitution of Rocket as Explo's transferee is not a determination of Rocket's liability. In the first place, as both Explo and Rocket have suggested, it would be hasty to arrive at this conclusion at a moment when we do not know if Explo will not satisfy the judgment. Of yet greater importance are the possible violations to the due process clause that such a determination would entail if made without an adequate hearing. Likewise, it is necessary to realize that the answers to the question of Rocket's liability are not found in the court's decision concerning Explo's contractual liability to Garlam,

but rather, are best approached by examining the applicable criteria to determine in what situation a transfer of corporate assets also includes the transfer of the corporation's liabilities.6/ This is so for Rocket was brought to this action as a possible successor in interest of Explo which would be liable to Garlam on the basis of the judgment and not on the basis of the contractual rela-

---

6/ Without advancing the applicable law to the present circumstances we note that the general view is that when one corporation sells or otherwise transfers all of its assets to another corporation the latter is not liable for the debts and liabilities of the transferor, except if the purchaser expressly or impliedly agreed to assume such debts, if the transaction amounts to a consolidation or merger of the corporations, if the purchasing corporation is merely a continuation of the selling corporation or if the transaction is entered into fraudulently to avoid liability. R.J. Enstrom Corp. v Interceptor Corp., 555 F.2d 277, 281-2 (10th Cir. 1977).

tionship liability that originated the case.

In Panther Pumps & Equipment Co. v Hydrocraft, Inc., 566 F.2d 8 (7th Cir. 1977) cert. denied Beck v Morrison Pump Co., 435 US 1013 (Panther Pumps), the district court accepted the argument raised by a party brought under Rule 25(c) that to join it would violate the due process clause since judgment had already been entered. The appellate court reversed stating that the lower court had misconceived the charge against the party to be substituted and the reasons for bringing him to the action at that stage, stating:7/

> Beck, in the motion to substitute, was not charged with 'the original patent infringement.'

7/ Opinion by Howard Thomas Markey, Chief Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

> Beck was charged with acts by which he became the successor in interest of Hydrocraft, a judgment debtor. The nature of the original tort that resulted in the judgment is immaterial. It could have been libel, slander, assault, battery, patent infringement or some other tort. The charge was (and is) that Beck is the successor in interest of the judgment and debtor and therefore liable on the judgment. Against this charge Beck was entitled under the Due Process Clause to an opportunity to defend himself. Id. at 24.

The Court then determined that Beck had that opportunity at the hearing where the charge that he was defendant's successor in interest was fully discussed. The question of personal jurisdiction in this case, viewed in its proper perspective, is not one of determining whether personal jurisdiction over the party to be substituted existed since the filing of the complaint but rather whether the reasons adduced for a Rule 25 substitution

are sufficient to persuade the court[8] that at this stage of the proceedings there is cause to issue an order to bring into the action the party to be substituted[9] and then to determine if

---

8/ On the matter of the exercise of discretion in granting a Rule 25 substitution see: Prop-Jets, Inc. v Chandler, 575 F.2d 1322, 1324 (10th Cir. 1978) and Froning's Inc. v Johnston Feed Serv., Inc., 568 F.2d 108, 110 n.4 (8th Cir. 1978); cf. United States v F.D. Rich Company, 437 F.2d 549 (9th Cir. 1970) (ample discretion to substitute parties where a corporate dissolution or some other act affecting the capacity to sue has occurred).

9/ In a similar fashion, a court may accept as a legal fiction subject to later challenge that specific allegations of a complaint as to an out of state parent corporation officer's negligent acts are sufficient to determine at an early stage in the proceeding that personal jurisdiction exists and that the Court has authority to summon that party, see: Escude Cruz v Ortho Pharmaceutical Corp. 619 F.2d 902 (1st Cir. 1980). It has also been recognized as an inherent attribute of a court that it has the power or authority to determine jurisdiction. See generally: 13, C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure, Sec. 3566 (1975 ed.).

substitution is proper. The crucial period then to determine as to when personal jurisdiction over the substituted party must exist is at the moment when substitution is requested.

The two cases that Rocket has brought to our attention which discuss issues related to the present situation do not support the proposition that personal jurisdiction must exist over the party to be substituted since the filing of the complaint. In Panther Pumps, the court denied the motion for substitution of a corporation (Universal) that had received the assets of defendant corporation Hydrocraft because it faced the "insurmountable obstacle" of lack of personal jurisdiction. Id. at 23. However, this holding, when examined in its particular factual situation, does not necessarily govern our decision today. In

that case the court did impose liability of the judgment-debtor upon a successor[10] thus, allowing plaintiff to obtain an effective judgment, whereas in our situation there is a real possibility that Explo's assets may be insufficient to cover part of Garlam's judgment and that there would be no other entity or person from whom recovery can be had. Panther Pumps merely states that the district court had not acquired jurisdiction. The reasons why the trial court did not exercise personal jurisdiction over Universal,[11] while doing so as

---

10/ Mr. Louis Beck (Beck) whom the Court found to be Hydrocraft's successor in interest.

11/ The court said at page 23:

> The motion to substitute Universal faces an insurmountable obstacle: lack of personal jurisdiction. 'The consistent constitutional rule has been that a

(See next page.)

to Beck, were not discussed nor was any explanation given as to why there was no personal jurisdiction over the corporation. All that was said was that the lower court's order was only directed to Beck and did not include Universal. The lack of elaboration in Panther Pumps on this particular matter serves to provide little, if no guidance.

In any event, it should be noted that the district court's decision on the matter of substituting parties under Rule

---

(Continued from previous page.)

court has no power to adjudicate a personal claim or obligation unless it had jurisdiction over the person of the defendant.' Zenith Radio Corp. v Hazeltime Research, Inc., 395 US 100, [sic] 110, 89 S.Ct. 1562, 1569, 23 L.Ed. 2d 129 (1969). The district court's order to show cause was directed only to Beck, it did not bring Universal before the lower court. Although we have held, supra, that Universal is merely Beck's alter ego, that fact cannot alone confer personal jurisdiction over Universal.

25(c) was taken after a two week evidentiary hearing. Id. at 24. In contrast to our case, an opportunity was given to fully discuss the arguments and to present evidence in support of the need to substitute. Also significant is the fact that, although the Circuit Court felt that it was unnecessary to rule on the lower court's determination of personal jurisdiction over Beck,12/ the facts of that case reveal that Beck was not an original defendant and that the court acquired personal jurisdiction over him because of acts he committed after the complaint was filed. The other case relied upon by Rocket, Ransom v Brennam,

---

12/ "Respecting Beck, however, the lower court held that it had personal jurisdiction over Beck and he has not appealed that ruling. It is res judicata that the order to show cause was properly issued by the district court and that it subjected Beck to the district court's jurisdiction. . . ." Id.

437 F.2d 513 (5th Cir. 1971), cert. denied 403 US 904 (Ransom), serves only to further strengthen the position that personal jurisdiction over a substituted party does not necessarily have to exist from the moment the complaint is filed. In Ransom, after the defendant died plaintiffs moved to substitute the decedent's executrix pursuant to Rule 25(a)(1). The executrix was notified according to Rule 5, Fed. R. Civ. P., by mailing the motion to decedent's attorney. The court found the notice improper and dismissed the motion for substitution. The question was posed as to what a court "having subject matter jurisdiction must do to obtain personal jurisdiction over the party sought to be substituted. . . ." Id. at 516. It was held that, in order for the court to acquire personal jurisdiction, Rule 4,

Fed. R. Civ. P., had to be used when the party to be substituted had not previously appeared in the action. Discussing the trial court's reliance on the holding of Butsch v Canterbury, 18 FRD 23 (SDCal. 1955), to the effect that once personal jurisdiction was acquired over the original party it continued over the substituted party, the Circuit Court commented:

> If this second clause is construed otherwise, as a statement that in personam jurisdiction over the original party so continues over the party named as a potential substitute as to subject him to the power of the court without the necessity of service of process, then in our opinion it is wrong, and we decline to adopt any such principle. Ransom at 518.

Thus, Ransom stands for the proposition that if the substituted party has never before appeared he must be served pursuant to Rule 4, Fed. R. Civ. P. To infer

from this holding what Rocket pretends is a misinterpretation. On the contrary, the court in Ransom suggested that it could acquire personal jurisdiction over the executrix by the proper service of summons even though she had no relationship or contacts with the forum. It interpreted the wording in Rule 25(a)(1) permitting service of the motion and notice of hearing "in any judicial district" and Rule 4(f) Fed. R. Civ. P., which provides that service of process may be made beyond the territorial limits of the state in which the district court is held when authorized by the rules, to support its authority to serve summons outside its territorial limits. However, since the executrix had not been summoned properly the motion for substitution was denied. In any event, Rocket's involvement with our forum upon acquiring an

interest in an ongoing judicial proceeding and the fact that it is paying for Explo's attorney's fees in this action,[13] coupled with the real possibility that a party could be deprived of its right to obtain an effective judgment, are more than sufficient, even assuming the dubious minimum contacts requirement, to determine if substitution should be made and to consider if Rocket is liable as a successor in interest. See: American Renaissance Lines, Inc. v Saxis Steamship Co., 71 FRD 703, 705 EDNY 1976); Wainwright v Kraftco Corporation, 58 FRD 9, 13 (NDGa. 1973). Rocket's voluntary decision to acquire Explo's

---

13/ Although the Court mentioned in its order of October 29, 1979 that this fact was not adequately proven, counsel for Explo, later admitted by sworn statement that Rocket had been paying the attorney's fees incurred in this action since it acquired the interest.

interests in this litigation and to monitor its course by paying the attorneys afforded it sufficient actual notice of the exact nature and complexities of the case and of the probable risks in order to prepare itself beforehand for the reasonable anticipation of being brought into the action as a successor in interest. Thus, any possible violations to the due process clause are absent. See: World-Wide Volkswagen Corp. v Woodson, 444 US 286, 292 (1980) and Keeton v Hustler Magazine, No. 81-1489, slip op. at 2 (1st Cir., June 16, 1982).

Therefore, although the order dismissing the amended counterclaim was correct within the procedural framework that the court utilized, we deem that fairness requires that Garlam be given an opportunity to move for a Rule 25 substitution, if the circumstances so

dictate.[14] Both parties must be given an opportunity to gather information and explore the issue of liability thus framed and to present their position as to the applicable law on corporate liability; see note six, the convenience of the forum, the possibility of a transfer, the type of summons required or whatever other arguments they deem relevant to the situation. We forewarn Garlam that if it decides to request substitution it must adequately support its motion,[15] and, in view of our rather extensive consideration of these issues, we expect Garlam, as well as the other parties, to come

---

[14] If Explo assets are insufficient to satisfy that part of the judgment exceeding the policy, for example.

[15] Cf. Marcano v Offshore Venezuela, C.A., 497 F. Supp. 204 (EDLa. 1980) (individual seeking to prosecute action as legal representative of deceased had to make proper showing to that effect before Rule 25(a) substitution was granted).

forth with well researched and adequately grounded positions. We are painfully aware that the end result of this ruling may well be an additional dilation of this ten year old case, yet to leave the matter as it stands is a blow to fairness[16/] and by doing so we would be inviting more delay and appeals.

Accordingly, the Motion for Reconsideration is DENIED. Defendant counterclaimant Garlam is ORDERED to file within fifteen (15) days after notice of this Order a motion for substitution in accordance with Rule 25(c) Fed. R. Civ. P., at which time the Court shall order that summons be served on Rocket and thereafter a hearing shall be held to

---

16/ It is only fair to at least permit Garlam to enter the "dark and dismal forest known to all as the corporate reshuffle." Moody v Albemarle Paper Company, 50 FRD 494 (EDNC 1970).

determine if Rocket is in fact the successor in interest of Explo, Garlam's judgment debtor.

SO ORDERED.

At San Juan, Puerto Rico, on November 16, 1982.

CARMEN CONSUELO CEREZO
United States District Judge

73545/A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EXPLOSIVES CORPORATION OF AMERICA,	)	
Plaintiff	)	CIVIL
vs	)	72-0001 CC
GARLAM ENTERPRISES CORPORATION AND FEDERAL INSURANCE COMPANY	)	
Defendants	)	

MOTION FOR SUBSTITUTION OF PARTY
PURSUANT TO RULE 25(C) OF THE
FEDERAL RULES OF CIVIL PROCEDURE

TO THE HONORABLE COURT:

COMES NOW defendant, GARLAM ENTERPRISES CORPORATION, and respectfully sets forth:

1. That this Court substitute the name of plaintiff, Explosives Corporation of America, for Rocket Research Corporation, now called Rockcor, Inc. (hereinafter called Rockcor).

2. That substitution is proper, pursuant to the provisions of Rule 25(c), of the Federal Rules of Civil Procedure because:

a) Plaintiff herein, Explosives Corporation of America, is no longer a legal entity and has no assets with which to pay a judgment;

b) Rockcor, through its continuous conduct and acts, has become the successor in interest of plaintiff herein, Explosives Corporation of America;

c) Rockcor is the successor, assignee, or guarantor of Explo and thus a proper party for substitution.

3. A supporting brief is attached hereto.

WHEREFORE, Garlam Enterprises Corporation respectfully prays this Honorable Court that:

a) It order the name of plaintiff and counter-defendant to be substituted by the new party in interest, Rockcor, Inc. in all pleadings and writings that have been filed in this court, and;

b) That it order the Clerk of this Court to issue summons against Rockcor so that same may be served upon Rockcor, with a notice of hearing, pursuant to Rule 4 of the Federal Rules of Civil Procedure, along with copy of this Motion for Substitution of Parties.

c) That Rockcor be ordered to appear for a hearing before this Court to

set forth its opposition for the substitution, if any there should be.

At San Juan, Puerto Rico, this 15th day of December, 1982.

I HEREBY CERTIFY that a true copy of this document has been mailed to Salvador Antonetti, Esq. c/o Fiddler, González and Rodríguez, G.P.O. Box 3507, San Juan, Puerto Rico 00936.

Respectfully submitted,

CORDERO, COLON & MIRANDA
P.O. Box S-1581
Old San Juan,
Puerto Rico 00903
Tels: 721-5554 & 721-5750

By: [signed]
CHARLES A. CORDERO

73545/A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 83-1218

EXPLOSIVES CORPORATION OF AMERICA

Plaintiff

-vs-

GARLAM ENTERPRISES CORPORATION,
et als.

Defendants and Third Party
Plaintiffs, Appellees

MOTION TO DISMISS FOR LACK OF
APPELLATE JURISDICTION

TO THE HONORABLE COURT:

COMES NOW appellee, Garlam Enterprises Corporation, and respectfully sets forth:

1- That attached hereto is a copy of the Order entered below on February 18, 1983[1/] which appellants mention in their

---

1/ Said order is marked as Appellee's Exhibit I.

"Statement Pursuant to Local Rule 8(a)" dated March 29, 1983.

2- That pursuant to the Order of the court below, it is clear that this court lacks jurisdiction since the judgment was entered on November 16, 1982, and the notice of appeal was not filed until March 17,1983.

3- In the alternative appellee pleads that the judgment entered by the court below is not a "final decision" since the judgment appealed does not contain the certification required under Rule 54(b), F.R.Civ. P., in that there are claims which affect the rights of the parties pending resolution by the court below. Therefore, this court lacks appellate jurisdiction since a final order has not been entered. See Coulter -vs- Sears Roebuck & Company (5th Cir - 1969) 411 F2 1189; A.O. Smith Corporation -vs- Sims

Consolidated Ltd. (10th Cir - 1981) 647 F2 118.2/

4- That the conduct of appellant mandates attorney's fees and costs since the appeal can only be considered as evidence of further delay tactics used by appellants. This case involves an action which was first filed in January 1972 and appellees (who are counter-claimants) have been seeking relief since that time.

WHEREFORE, appellees pray this Honorable Court that the appeal be dismissed for lack of appellate jurisdiction.

At San Juan, Puerto Rico, this _____ day of April 1983.

I CERTIFY that a copy of the foregoing has been mailed to: Salvador

---

2/ Copy of Judgment is attached as Exhibit II for Appellee.

Antonetti, c/o Fiddler, González & Rodríguez, GPO Box 3507, San Juan, Puerto Rico 00936; Oles, Morrison, Rinker, Stanislaw & Ashbaugh, 3208 Seattle First National Bank Bldg., Seattle, Washington 98154.

Respectfully submitted,

CORDERO, COLON & MIRANDA
P.O. Box S-1581
Old San Juan,
Puerto Rico 00903
Tels: 721-5554 & 721-5750

By: [signed]
CHARLES A. CORDERO

73545/A-3